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No. 80-1991

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF OREGON

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union Foundation of Oregon, Inc. is a nonprofit organization dedicated to defending civil and constitutional rights. ACLU-Oregon appears as Amicus with the consent of the defendant and the State of Oregon.

CONSTITUTIONAL PROVISIONS

Oregon Constitution article I, section 12:

> No person shall be put in jeopardy twice for the same offence . . . .

United States Constitution amendment V:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

United States Constitution amendment XIV:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

SUMMARY OF ARGUMENT

I.

Because the holding below rests on an adequate state ground, the Court should dismiss the writ of certiorari as improvidently granted.

Alternatively, the Court should decline to decide the federal constitutional questions raised in this case until the Court has permitted the Oregon Court of Appeals to clarify, upon vacation and remand of the judgment, whether the state constitutional double jeopady clause, raised by the defendant below, would adequately and independently dispose of the case.

The judgment of the Oregon Court of Appeals rests in part upon the Oregon court's application of the state's own constitutional double jeopardy guarantee. The opinion itself refers to no federal constitutional text. And, although the decision discusses federal cases interpreting the Fifth Amendment, it also cites State v. Rathbun, 287 Or. 421, 600 P.2d 392, a 1979 Oregon Supreme Court double jeopardy case. Rathbun applied the Oregon Constitution's double jeopardy clause, article I, section 12, to bar a second prosecution in circumstances very similar

to the facts in Kennedy.[1] Particularly when read in light of Oregon's tradition of deciding applicable state law claims before reaching any issue of federal due process, see, e.g., Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981), the opinion sufficiently rests upon an independent and adequate state ground to preclude this Court's review at this time. Accordingly, the writ should either be dismissed, or the case vacated and remanded to the Oregon courts under California v. Krivda, 409 US 33, 35 (1972), for articulation of the basis for the decision.

Dismissal or remand would avoid an erroneous assumption of this Court's jurisdiction. Dismissal or remand would also avoid this Court's rendering what will almost certainly be an advisory opinion. Defendant would entitled be to reassert his state constitutional claims in Oregon regardless of what this Court says about federal

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[1] Alternative grounds for decision are generally considered independent, and not dicta. See United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924). See also Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949).

law. The holding in State v. Rathbun, supra, would likely compel the Oregon Court of Appeals once again to rule for the defendant. This Court could avoid the risk of rendering a purely advisory opinion on the meaning of the federal Fifth Amendment by first remanding the cause back to the Oregon courts for a determination whether the opinion rests on state law, federal law, or both. Only if the judgment for the defendant necessarily rests only on federal law is it appropriate for this Court to exercise its jurisdiction and to express its opinion. Herb v. Pitcairn, 324 U.S. 117, 125 (1945).

Alternatively, the Court should vacate and remand without decision even if the Court determines that the Oregon Court of Appeals did not intend to rest its decision on the Oregon Constitution. Defendant below expressly raised the Oregon double jeopardy clause in his defense. Even assuming arguendo that the Court of Appeals bypassed article I, section 12, of the Oregon Constitution to decide this case, this Court, as a matter of policy, should nevertheless permit the Court of

Appeals and Supreme Court of the State of Oregon to rule expressly on defendant's Oregon constitutional claim before the Court reviews the federal questions which may also be present on the record.

Amicus respectfully submits that this is an appropriate occasion for the Court to adopt a policy of declining to review a state court judgment reversing a conviction involving federal questions until all state law questions which are raised below have in fact been resolved by the state court adversely to the defendant. This rule, suggested by Justices Marshall and Brennan in Oregon v. Hass, 420 U.S. 714, 729 (1975), would diminish unnecessary federal court review of state court decisions, reduce the risk of advisory opinions, avoid jurisdictional puzzles, encourage state courts to assume responsibility for applying their own laws, and help to relieve the heavily burdened Supreme Court docket. Reflecting the federalist principle of respect and comity, this restraint would lead to a measure of decentralized standards in the criminal justice system, and would return to the states a

measure of responsibility for regulating these sensitive relations between government and citizen to the states, subject only to federal minimum standards.

ARGUMENT

I.

BECAUSE THE DECISION BELOW MAY WELL REST ON AN INDEPENDENT AND ADEQUATE STATE GROUND, THE COURT SHOULD DISMISS THE WRIT, OR SHOULD VACATE AND REMAND THE CASE FOR CLARIFICATION BY THE OREGON COURTS.

Since at least 1939,[2] the Supreme Court has followed a practice of dismissing or remanding state cases back to state courts for clarification whenever the Court is in doubt whether the judgment below rested solely and necessarily on federal law grounds.[3] The rule is based on a concern with

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[2] See State Tax Comm'n v. Van Cott, 306 U.S. 511 (1939). See also California v. Krivda, 409 U.S. 33, 35 (1972); Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 196-97 (1965); Herb v. Pitcairn, 324 U.S. 117, 128 (1945); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

[3] The Supreme Court vacated and remanded six such cases for clarification during the October 1980 Term alone. See cases cited in footnote 10 infra.

observing the constitutional division of authority between the state and federal systems, a division which safeguards to the states the right freely to interpret their own statutes and constitutions. And, as Justice Jackson explained in the much-cited Herb v. Pitcairn:

> [W]e cannot perform our duty to refrain from interfering in state law questions and also to review federal ones without making a determination whether the one or the other controls the judgment. And in cases where the answer is not clear to us, it seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended.

324 U.S. 117, 127-28 (1945).

Typically, in doubtful cases, the prevailing party below has relied upon both state and similar federal constitutional guarantees. The ambiguity arises when the state court renders an apparent constitutional holding, but does not clearly specify whether the court intends to rely solely upon an independent state ground, solely upon a federal ground, or upon both.[4] Under these

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[4] Delaware v. Prouse, 440 U.S. 648 (1979), typifies an exception to this general rule. The

circumstances, the Court will require the party seeking review to demonstrate that a federal question is necessarily presented and that the Court's jurisdiction is therefore clear.[5]

Oregon v. Kennedy is precisely the type of case which the Court has customarily remanded for clarification under the Krivda rule.[5] Decision of this case without first giving the Oregon Court of Appeals an opportunity to eliminate any perceived ambiguities in its present opinion would erode sound and long-standing principles of restraint.

A. Federal Law Is Not the Sole Basis for the Court of Appeals' Holding.

1. No constitutional text is cited.

Both article I, section 12, of the Oregon Constitution and the Fifth Amendment to the

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4 (continued)

Prouse case is distinguishable from the Kennedy case in importan ways. See discussion below at pp. 19-27.

5 Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965).

6 California v. Krivda, 409 U.S. 33, 35 (1972).

United States Constitution contain a prohibition against what is commonly called "double jeopardy."[7] Defendant raised the Oregon Constitution as a defense to his second prosecution. He also raised the same challenge under the federal Constitution. Both clauses were cited and briefed to the Oregon Court of Appeals. See Defendant's Brief p. 8; State's Brief pp. 7-8.

The Oregon court cited neither Constitution in Oregon v. Kennedy. The court's opening paragraph simply stated the error assigned as the "trial court's failure to dismiss the case against [defendant] based upon a theory of prior jeopardy." 49 Or. App. at 417, 619 P.2d at 949. The opinion goes on to refer to "prior jeopardy"

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[7] The relevant language of each clause is set forth for comparison. Or. Const. art. I, § 12:

> No person shall be put in jeopardy twice for the same offence . . . .

U.S. Const. amend. V (as applied to the states by the Fourteenth Amendment):

> [N]or shall any person be subject for the same offence to be twice put in jeopardy.

or the "double jeopardy clause" four more times, always without citation to any constitutional text. Judge Gillette's short discussion adverts to decisional law based solely on the Federal Constitution, United States v. Dinitz and United States v. Jorn, and to decisional law based solely on the Oregon Constitution's double jeopardy clause, State v. Rathbun, supra, but comes to rest openly upon neither. From all that appears in the opinion, the court may even have intended to rule for the defendant on the Oregon common law principle of "prior jeopardy." See, e.g., State v. McCormack, 8 Or. 236 (1880) (Oregon prior jeopardy clause is equivalent to a declaration of the ancient common law principle that no person shall be twice tried for the same offense).

2. State v. Rathbun - controlling state law.

The Court of Appeals' opinion would probably be too indefinite for purposes of confident assumption of federal question jurisdiction even without the court's reliance on State v. Rathbun, 287 Or. 421, 600 P.2d 392 (1979). The citation

to Rathbun, however, demonstrates an adequate and independent state ground for the Kennedy holding. Rathbun, a double jeopardy case decided by the Oregon Supreme Court solely under the state constitution, dictated the result below.

Rathbun held that article I, section 12, of the Oregon Constitution barred retrial of the defendant when prejudicial remarks made by an officer of the court -- a bailiff -- contaminated the jury so as to require a mistrial, even though causing a mistrial was not the bailiff's intent. 287 Or. at 432-33, 600 P.2d at 398. The mistrial in the Kennedy case was similarly provoked by prejudicial remarks before the jury by the prosecutor, also an officer of the court, also without intent to cause a mistrial. 49 Or. App. at 418, 619 P.2d at 949.

The Kennedy result is precisely in keeping with the following key language in Rathbun:

> Undisputably, however, a first trial is a bar to a second where a mistrial is declared because of prosecutorial or judicial misconduct.

287 Or. at 432, 600 P.2d at 398. Unlike the implications of available Fifth Amendment precendent, the concept of prosecutorial "misconduct" is not, according to Rathbun, limited to misconduct intended to cause a mistrial, for the Oregon Supreme Court concluded:

> The state put this officer of the court in the position to wreak havoc and must bear the same burden as when its prosecutor in like manner offends.

287 Or. at 433, 600 P.2d at 398 (emphasis added). This statement strongly implies that unintentional prosecutorial "havoc" will also bar a second prosecution under the Oregon Constitution.[8]

In determining whether the Oregon Court's opinion is grounded on state or federal

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[8] The opionion below also provides reason to believe the Court of Appeals was not persuaded that the federal precedents it cited covered the case at hand. The court's scepticism is recorded in footnote one of the opinion:

> As the text of our opinion, post, indicates, we are not sure that the subjective intent of the prosecutor should necessarily play a pivotal role in the decision as to whether or not prior jeopardy forbids retrial.

49 Or. App. at 418 n.1, 619 P.2d at 949 n.1.

law, the Court must not stop at the bare language of the opinion. The Court must also focus on what in fact the Oregon Court of Appeals has done. The judgment for Mr. Kennedy is in accord with Oregon precedent. The opinion is a correct statement of Oregon double jeopardy law. It is, therefore, unsurprising that the Oregon Supreme Court declined to grant discretionary review of the Court of Appeals' decision. Although denial of review does not necessarily connote approval of the lower court's opinion, the Supreme Court could well have been satisfied that Kennedy had correctly applied the holding of State v. Rathbun.

Rathbun may represent, as the Oregon Attorney General asserts, a "uniquely errant interpretation of jeopardy principles," see Brief for Petitioner State of Oregon p. 37, but it is Oregon law. The propriety of Oregon's

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8 (continued)

The Court's reference is, plainly, to United States v. Jorn, 400 U.S. 470 (1971), and United States v. Dinitz, 424 U.S. 600 (1976), which implied that only a prosecutorial intent to provoke a mistrial bars a second prosecution.

interpretation of its own constitution is not reviewable by this Court, despite the prosecution's displeasure with it. If this Court is persuaded that the holding is compelled by the Oregon Constitution, it must dismiss the writ.

Moreover, Rathbun so clearly dictates the result in Kennedy that the holding seems virtually certain to compel a judgment for the defendant even if the Fifth and Fourteenth Amendments do not. Accordingly, this Court runs the risk of transgressing its long-standing rule against rendering advisory or unnecessary opinions if it decides this case merely to correct the Oregon Court of Appeals' suspected view of federal law.[9] The rule against advisory opinions is well-stated in Herb v. Pitcairn, which declares:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments,

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[9] This Court's decision in South Dakota v. Opperman, 428 U.S. 364 (1976), was subsequently rendered advisory on remand to the South Dakota Supreme Court, which reversed the conviction under its state constitution. State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

> not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

324 U.S. at 125-26 (emphasis added).

The Court has authority to review the case before it only if the federal ground is the sole basis for the decision. Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 198 (1965). The Court can have no such certainty in this case. And, the Court should be doubly wary of assuming jurisdiction when the risk is so plain that the Court's eventual decision will have no effect on this defendant's case.

3. The legally appropriate practice is to dismiss the writ, or, alternatively, to vacate and remand.

The Kennedy opinion, if it does not clearly reflect its state-law underpinnings, is nevertheless well within the class of cases which the Court considers sufficiently ambiguous to warrant dismissal or remand. Relying on the reasoning of California v. Krivda, supra, the Court has vacated and remanded for clarification at

least 17 such decisions in the last 9 terms alone.[10] Many, if not most, of these cases contain considerably less evidence of reliance upon state law -- therefore much less reason to be cautious about the possibly erroneous assumption of jurisdiction -- than does the Kennedy case.

Pennsylvania v. Campana, 414 U.S. 808 (1973), is illustrative. In Campana, a double jeopardy case, the Pennsylvania Supreme Court seemed to ground its decision openly on federal law:

> Presented for consideration in these consolidated appeals is whether appellants . . . were subjected to "Double Jeopardy" in contravention of the Fifth and Fourteenth Amendments of the United States Constitution [citing Benton v. Maryland, 395 U.S. 784 (1969)]. We hold that . . . the second prosecutions violated the Double Jeopardy Clause of the Fifth Amendment.

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[10] See California v. Silvey, 101 S. Ct. 3153 (1981); Michigan v. Peques, 101 S.Ct. 3073 (1981); Washington v. Fitzsimmons, 449 U.S. 977, (1980); California v. Level, 449 U.S. 945 (1980); California v. Superior Ct., 449 U.S. 945 (1980); California v. Braeseke, 446 U.S. 932 (1980); Illinois v. Vitale, 439 U.S. 974 (1978); Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241 (1978); Percy v. Terry, 434 U.S. 808 (1977); General Atomic Co. v. Felter, 429 U.S. 973 (1976); Ohio v. Gallagher, 425 U.S. 257 (1976); Louisiana v.

Commonwealth v. Campana, 452 Pa. 233, 239-40, 304 A.2d 432, 434 (1973) (footnotes omitted). The majority opinion went on to discuss the common law origin of double jeopardy, and the cases decided under the Pennsylvania Double Jeopardy Clause (which had been limited to capital cases only), but did not expressly tie the holding to state law. Both dissenting and concurring judges in Campana viewed the decision as one of federal constitutional law. See 452 Pa. at 269, 304 A.2d at 446 (Pomeroy, J., dissenting) ("The Court does not purport to bottom its decision on any theory of Pennsylvania as distinguished from federal constitutional law."); and 452 Pa. at 256, 304 A.2d at 451 (Eagen, J., concurring) (question for the court is the scope of the Fifth Amendment). Nevertheless, the Supreme Court found sufficient ambiguity

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10 (continued)

Mora, 423 U.S. 809 (1975); Roundhouse Constr. Corp. v. Telesco Masons Supplies Co., 423 U.S. 809 (1975); Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974) (reversed and remanded); Pennsylvania v. Campana, 414 U.S. 808 (1973); Department of Motor Vehicles v. Rios, 410 U.S. 425 (1973); California v. Krivda, 409 U.S. 33 (1972).

to warrant vacating and remanding the case to Pennsylvania for an answer to the Krivda question whether the holding was based on federal or state law. Pennsylvania v. Campana, 414 U.S. 808 (1973).

If the Pennsylvania majority opinion's marginal treatment of state law created an uncertainty which counseled remand--in spite of that court's overt federal holding--then Oregon v. Kennedy, a "prior jeopardy" judgment citing neither Constitution, presents an even more serious question of judicial intent. When the intent is less than completely clear, only remand will avoid the risk of an erroneous assertion of federal jurisdiction.

Unfortunately, it is commonplace for many state judges to announce constitutional law without benefit of textual reference to the applicable law. Thus, of the six state criminal procedure cases in which this Court granted certiorari during the October 1980 Term and then vacated and remanded pursuant to Krivda, four, like Kennedy, invoked no constitutional clauses of any kind, but

relied on decisional law invoking both state and federal constitutional concepts.[11] Two others referred explicitly to various federal constitutional amendments, but were clouded by references to decisions citing neither Constitution[12] or decisions relying on both Constitutions.[13]

B. The Question of the Supreme Court's Jurisdiction in this Case Is Not Answered by Delaware v. Prouse.

Delaware v. Prouse, 440 U.S. 648 (1979), illustrates an exception to the Court's general practice of vacating and remanding whenever the state court relies on the state charter as one ground for its holding. The Court assumed jurisdiction in Prouse because it determined that,

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11 See People v. Silvey, 110 Cal. App. 3d 67, 167 Cal. Rptr. 566 (1980); People v. Level, 103 Cal. App. 3d 899, 162 Cal. Rptr. 682 (1980); People v. Braeseke, 25 Cal. 3d 691, 602 P.2d 384, 159 Cal. Rptr. 684 (1979).

12 See People v. Peques, 104 Mich. App. 45, 304 N.W.2d 482 (1980), aff'd, 410 Mich. 894, 304 N.W.2d 455 (1981) (citing People v. Westerfield, 71 Mich. App. 618, 248 N.W.2d 641 (1976), and others).

13 See State v. Fitzsimmons, 93 Wash. 2d 436, 610 P.2d 893 (1980) (citing City of Tacoma v. Heater, 67 Wash. 2d 733, 409 P.2d 867 (1966)).

despite citation to the Delaware Constitution, the Delaware Supreme Court did not intend to rest its decision independently on the state charter. 440 U.S. at 650-53. Two significant factors led to this conclusion, factors not present in the Kennedy case.

First, the language of the Delaware court's decision itself indicated that the court would initially decide the federal Fourth Amendment question and then automatically tack that holding onto the similar state search and seizure clause. This approach, assuredly, is the opposite of independent analysis. Second, earlier Delaware cases reflected a consistent tradition of reliance on Fourth Amendment cases to find a violation of state law. See 440 U.S. 652-53 n.5. Thus, the Supreme Court was confident that the state court, far from being independent, had felt compelled by federal law to reach the result which the Court then reviewed.

No similar language in the Kennedy opinion evinces this sort of compulsion to follow federal precedents. The Oregon Court of Appeals does not hold that the double jeopardy clauses are necessarily coterminuous. And, a brief review of Oregon decisional law will demonstrate that in criminal procedure cases (including cases involving double jeopardy protection), and in constitutional adjudication in general, Oregon has a firm tradition of vigorous, independent analysis of the state Bill of Rights.

1. Double jeopardy cases.

This independent tradition is strikingly evident in litigation under Oregon's double jeopardy clause, Or. Const. art. I, § 12. Oregon's Constitution was adopted in 1859, nine years before the federal Fourteenth Amendment. See State v. Smyth, 286 Or 293, 297, 593 P2d 1166, 1168 (1979). Early, necessarily "independent" applications of article I, section 12, are reported in State v. McCormack, 8 Or. 236 (1880) (barring two convictions for a unitary crime), and State v. Shaffer,

23 Or. 555, 32 P. 545 (1893) (article I, section 12, not offended by retrial after mistrial due to a "hung jury").

Even after the United States Supreme Court announced in Benton v. Maryland, 395 U.S. 784, 794 (1969), that the double jeopardy prohibition of the Fifth Amendment applied to the states through the Fourteenth Amendment, Oregon continued its tradition of independent double jeopardy analysis The basis for State v. Brown, 262 Or. 442, 497 P.2d 1191 (1972), decided by the Oregon Supreme Court just three years after Benton, could not be clearer:

> We are without clear authority from the Supreme Court when we consider whether a single act or course of conduct which violates more than one statute constitutes one or more offenses within the meaning of the double jeopardy provision of the Fifth Amendment. However, as our own constitution also prohibits a second jeopardy for the same offense, we need not speculate what the Supreme Court will decide. We are free to adopt our own interpretation of our state constitution.
>
> . . . We hold that under Article I, Section 12, of our Constitution, statutory violations may be the "same offense" for purposes of testing a second prosecution, even though each contains different elements and requires proof of different facts.

262 Or. at 453, 497 P.2d at 1196. State v. Rathbun continued this independent tradition, in a different strand of double jeopardy theory, when it declared:

> It seems that there is little to be gained by our attempting to guess what the United States Supreme Court might do under the Constitution of the United States if this case were before that court. We shall dispose of this case under Oregon law although giving proper weight to the statements of [the] United States Supreme Court which we find to touch upon the matter.

287 Or. 421, 431-32, 600 P.2d 392, 397 (1979) (footnote omitted).

2. Other Oregon cases.

Unlike the state of Delaware, the general rule in the Oregon courts when a party raises both state and federal claims is first to decide the effect of the state's own laws before addressing any federal issue. Justice Linde, speaking for the Oregon Supreme Court, has stated the Oregon rule in this way:

> The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism

> or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.

Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981).[14] According to the expressly declared Oregon rule, only if the state law is determined to be adverse to the claimant need the court reach and decide the federal constitutional issues. State v. Clark, 291 Or. 231, 630 P.2d 810 (1981); State v. Scharf, 288 Or. 451, 455, 605 P.2d 690, 692 (1980).[15] This, according to Justice Linde, is so for reasons of logic,[16] among others.

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[14] For a cogent exposition of this approach to the Fourteenth Amendment by Justice (formerly Professor) Linde, see Linde, Without "Due Process" --Unconstitutional Law in Oregon, 49 Or. L. Rev. 125 (1970), especially pp. 133-34.

[15] In Justice Linde's view, a defendant's "equivalent" state and federal constitutional claims are not cumulative but alternative. If the state law grants defendant the "process" that is "due," it follows that the state has not violated the Fourteenth Amendment. Thus, Justice Linde insists on a clear differentiation of federal and state constitutional arguments:

> Convenient as it may be to reduce the diverse federal and state premises in this manner to a single body of "constitutional law," there are two things

Prior to Kennedy, application of this logic produced a substantial body of independent state law analysis, both statutory and constitutional, in areas elsewhere frequently occupied only by federal due process precedents. These areas include: prisoners' rights, Sterling v.

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15 (continued)

> wrong with it. First, it contradicts the hierarchical logic of the federal constitutional premises. Second, the provisions of the federal and Oregon constitutions are not in fact alike.

49 Or. L. Rev. at 133.

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> First, the logical relationship between the state and federal constitutional claims. The federal source of all "due process" and "equal protection" attacks on state regulation is the fourteenth amendment's command that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Whether this command has been violated depends on what the state has finally done. Many low-level errors that potentially deny due process or equal protection are corrected within the state court system; that is what it is for. The state constitution is part of the state law, and decisions applying it are part of the total state action in a case. When the state court holds that a given state law, regulation, ordinance,

Cupp, supra; defendant's right to a prompt trial Haynes v. Burks, 290 Or. 75, 619 P.2d 632 (1980); public and press access to court proceedings, State ex rel. Oregonian Publishing Co. v. Deiz, 289 Or. 277, 613 P.2d 23 (1980); defendant's access to counsel, State v. Scharf, 288 Or. 451, 604 P.2d 690 (1980); right to bear arms, State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980); defendant's right to exculpatory evidence, State v.

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16 (continued)

> or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment.
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> The point is obvious when a conclusion such as "Regulation X denies defendant's rights under the fourteenth amendment and the corresponding sections of Oregon constitution article I" is broken down into its component parts. When a judgment holds with the defendant that the regulation is invalid under the state constitution, it cannot move on to a second proposition invalidating the state's action under the federal Constitution. By the action of the state court under the state constitution, the state has accorded the claimant the due process and equal protection commanded by the fourteenth amendment, not denied it.

49 Or. L. Rev at 133-34 (footnotes omitted).

Spada, 286 Or. 305, 594 P.2d 815 (1979); defendant's right to confront adverse witnesses, State v. Smyth, 286 Or. 293, 593 P.2d 1166 (1979); venue in criminal prosecutions, State v. Roper, 286 Or. 621, 595 P.2d 1247 (1979); right to counsel and to a jury trial, Brown v. Multnomah County Dist. Ct., 280 Or. 95, 570 P.2d 52 (1977); and illegal stops by police, State v. Valdez, 277 Or. 621, 561 P.2d 1006 (1977). This practice continues. See, e.g., State v. Clark, 291 Or. 231, 630 P.2d 810 (1981) ("privileges or immunities"); State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981) (right to bear arms).

Placed in this context, the probability that State v. Kennedy rests on an independent state ground is greatly enhanced.

II.

II. THIS CASE SHOULD BE VACATED AND REMANDED TO THE OREGON COURT OF APPEALS EVEN IF THIS COURT DETERMINES THAT THE LOWER COURT SIMPLY FAILED TO RESOLVE THE STATE ISSUE BEFORE IT.

A. Comity Requires that State Courts Resolve Potentially Dispositive State Issues Before Supreme Court Review.

Even if this Court finds that the Oregon Court of Appeals intended to ground its decision on the federal Fifth Amendment, and also failed to pass on the article I, section 12, issues, the Court should nevertheless remand the case to the Oregon Court of Appeals for resolution of the state constitutional issue which was cited and briefed by the parties. This, in fact, is the approach suggested several years ago by Justice Marshall, when he wrote:

> [W]e have too often rushed to correct state courts in their view of federal constitutional questions without sufficiently considering the risk that we will be drawn into rendering a purely advisory opinion. . . .
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> . . . .
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> In addition to the importance of avoiding jurisdictional difficulties, it seems much the better policy to permit

> the state court the freedom to strike its own balance between individual rights and police practices, at least where the state court's ruling violates no constitutional prohibitions. It is peculiarly within the competence of the highest court of a State to determine that in its jurisdiction the police should be subject to more stringent rules than are required as a federal constitutional minimum.
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> . . . Accordingly, in my view the Court should not review a state-court decision reversing a conviction unless it is quite clear that the state court has resolved all applicable state-law questions adversely to the defendant and that it feels compelled by its view of the federal constitutional issue to reverse the conviction at hand.

Oregon v. Hass, 420 U.S. 714, 726, 728-29 (1975) (dissenting opinion) (emphasis added). Thus, under Justice Marshall's view, whenever an unresolved state law claim was properly before the state court -- either because one of the parties cited the law or because under the rules of the state the court could raise the issue sua sponte -- the Supreme Court should vacate and remand the case, even when the state court seems to have

ignored the state law in deciding the federal law in the defendant's favor.[17]

Although in 1975, a majority of the then constituted Court was not persuaded by this view, Amicus respectfully submits that it is now timely for this Court to reconsider whether the policy suggested by the Oregon v. Hass dissenters -- akin to a rule of comity -- might not better serve the needs of a healthy federalism.

A rule that would encourage state courts to resolve a properly raised state law issue

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[17] Justice Marshall's suggested rule could not, of course, logically be extended to the reverse situation--that is, when the state court has ruled against the criminal defendant on federal grounds, but has failed to pass on cited state grounds. In that situation, the reasons for Supreme Court restraint would vanish. First, in contrast to the case at bar, federal rights might actually have been lost, making Supreme Court intervention imperative. Second, there would be no danger of inadvertent interference with a nonreviewable state ground. Third, there would be virtually no danger of an advisory Supreme Court opinion, since a state court which rules against a defendant on federal grounds, and ignores the cited state constitution, is extremely unlikely, on remand, to discover a state law reason for reversing itself.

before turning to federal law would serve a number of concerns which are, and should be, of importance to this Court. Commentators have articulated some of these concerns:

> The reasons for the adoption of the rule are as follows: it would enable the Court to avoid rendering advisory or unnecessary opinions; it would resolve the perplexing problem of attempting to discern upon which law the lower court's decision rests; in accordance with the doctrine of federalism it would establish a policy of permitting the individual states to strike the delicate balance when the state interest is paramount to the federal interest; it would also help maintain the state's political balance; and finally, it would greatly promote needed judicial economy.[18]

1. Unnecessary or advisory opinions.

The Court has stated that it is not permitted to render an advisory opinion. Herb v.

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[18] Galie & Galie, State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in Oregon v. Hass, 82 Dickinson L. Rev. 273, 280 (1978). The authors provide an excellent review of the implications for federal courts of the "new state court activism" in interpreting state Bills of Rights. They conclude that the basic policy proposed by Justice Marshall is desirable, provided that the Supreme Court, rather than refusing all review of decisions containing unresolved state issues, accepts review and vacates and remands these cases for lower court decision.

Pitcairn, 342 U.S. 117, 125-26 (1945). The reasons for the rule are equally applicable when state issues are raised but not squarely resolved. Whenever there are, on the record, state law grounds which may support the judgment before the court, the state court is free upon remand to reground its judgment on state law. As noted in Part I of the above Argument, this result is likely in the case at bar. The same result will follow with more frequency as more state courts become cognizant of their responsibility to interpret their own constitutions, in ways not necessarily identical to the tests employed to construe counterpart language in the federal Bill of Rights.[19]

2. Avoiding jurisdictional doubts.

The ambiguities frequently encountered in state appellate court opinions presented

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[19] There is also the matter of the differing nature of the texts of the various state constitutions. See Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379, 384-87 (1980).

for Supreme Court review do not allow for an easy and confident answer to federal jurisdiction questions. Employing Justice Marshall's rationale, the Court need only examine the record of a case, facially premised on federal law, to see whether a state law issue arguably decisive of the case was raised below. The Krivda approach of granting certiorari, then vacating and remanding for a decision on the applicable state law, is equally appropriate here. A properly raised but unresolved state issue in the record should be considered to be an "ambiguity" requiring remand.

3. Considerations of federalism and state court innovation.

The Court has repeatedly stated its respect for the independence of state functions, whether legislative or judicial. With increasing frequency, the Court has disapproved of federal intervention when state forums and state laws could resolve state concerns. This broad principle of comity is recognizable in a number of different types of litigation, but has had perhaps its most

familiar application in cases touching upon the state's administration of criminal justice.

In the "abstention" context, the Court, per Justice Black, expressed the principle in Younger v. Harris:

> [The] underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways. . . . [T]he concept [represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

401 U.S. 37, 44, 45 (1971) (emphasis added).

Chief Justice Burger, dissenting in a case striking a state statute as unconstitutional,

has pointed to unresolved state constitutional issues as a reason for noninterference:

> The reason for my dissent is that it seems to me a very odd business to strike a state statute, on the books for almost 40 years, without any opportunity for the state courts to dispose of the problem either under the Wisconsin Constitution or the U.S. Constitution. For all we know, the state courts would find this statute invalid under the State Constitution, but no one on either side of the case thought to discuss this or exhibit any interest in the subject.

Wisconsin v. Constantineau, 400 U.S. 433, 440 (1971) (emphasis added; footnote omitted).

In another context, the principle of comity has restrained federal courts from using their injunctive powers to interfere with state tax laws:

> The reason for this guiding principle [of equitable restraint] is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.

Matthews v. Rodgers, 284 U.S. 521, 525 (1932) (emphasis added).

Most recently, Justice Rehnquist, speaking for the Court, has held that the principle of comity also bars federal courts from granting damage relief in state tax cases, notwithstanding the Court's jurisdiction to do so by virtue of 42 U.S.C. § 1983 and 28 U.S.C. § 1343. Fair Assessment in Real Estate Ass'n v. McNary, 50 U.S.L.W. 4017, 4019 (Dec. 1, 1981).[20]

Amicus does not take the position here that comity should bar the doors of federal trial courts to civil rights litigants. Nevertheless, the Court's deference to state independence, according to these announced principles, is appropriate in cases like the present one.

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20 See also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 477 (1981) (Stevens, J., dissenting) (suggesting that there may be instances where state courts should be given greater latitude in applying federal law even though a reviewing federal court might rule differently).

These principles of comity support the policy stated in Justice Marshall's Oregon v. Hass dissent. Criminal procedure cases involve important relations between the sovereign states and their citizens. To be sure, the federal Constitution binds the states to provide no less in the way of procedural guarantees than is provided in the federal Bill of Rights. But if state law, cited to state courts and left unresolved by them, could provide state solutions to these problems of criminal justice, federal restraint pending their resolution may avoid the need for federal intervention at all.

There is another reason, also arising from the structure of a federal system of government, which makes restraint good policy. Overreliance on federal rights creates centralization of the criminal justice system, discouraging state experimentation. Chief Justice Burger voiced this concern when he stated:

> I add this comment only to emphasize the importance of allowing the States to experiment and innovate, especially in

> the area of criminal justice. If new standards and procedures are tried in one State their success or failure will be a guide to others and to the Congress.

California v. Green, 399 U.S. 149, 171 (1970) (Burger, C.J., concurring).[21]

4. Political balance within the states.

When a state court judge ignores available state law to base a holding on a federal constitutional clause, he or she places that decision beyond the reach of normal state political processes. Voters and legislatures do not learn what their own statutes and constitutions mean when those laws are bypassed by a reference to the federal precedents. State constitutions can be amended, typically with much greater ease than the

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[21] See also Douglas, State Judicial Activism--The New Role for State Bills of Rights, 12 Suffolk U.L. Rev. 1123, 1137 (1978). The author is a Justice of the New Hampshire Supreme Court.

federal charter,[22] if the citizenry disagrees with the judges' result, whether it be too protective or not protective enough of the right claimed. Statutes can implement newly interpreted state guarantees, in sufficient detail to achieve predictability and direction for state government officials. But if state courts are not encouraged to assume responsibility for interpreting and applying state law, these democratic processes at the state level are frustrated. So long as state courts can freely insulate their decisions from popular review by cloaking them in any federal phraseology, these courts place whole areas of important and potentially sensitive legal and political issues beyond the constitutional acountability ordained by state charter.

By encouraging state courts not to evade responsibility for interpreting their own

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22 See, e.g., Or. Const. art. IV, § 1 (constitutional amendment by popular initiative); id. art. XVII, § 2 (constitutional amendment by referral of legislative resolution).

laws, the proposed rule would be a step away from federal dominance of state policy-making and toward reinvigoration of policy at the state level.

5. Judicial economy.

Of course, federal rights may not be sacrificed to judicial economy. The rule counseling remand when state grounds are raised but not resolved should be applied only in those cases where the state court's ruling is not alleged to violate the defendant's constitutional rights, as Justice Marshall suggested in Oregon v. Hass.[23] In this way, the Court's burdened docket can be relieved without impairing minimum federal standards

CONCLUSION

This Court should not decide the federal constitutional issues raised in this case because to do so deprives the state court of an opportunity to dispose of the case on state law issues actually raised by the defendant. Further, in view of settled double jeopardy precedents under the Oregon Constitution, any opinion rendered by this Court

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23 420 U.S. at 728.

is likely to become merely advisory after defendant reasserts his state constitutional rights at the state level. Finally, the principle of comity counsels against unnecessary federal intervention in the conduct of the functions of state governments. Where, as here, state courts can resolve issues of local interest without resort to federal constitutional decision making, they should be encouraged by federal restraint to assume their rightful responsibility to do so.

Respectfully submitted,

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